Supreme Court, U.S.
FILED
MAR 10 1992
OFFICE OF THE CLERK

No. 91-810

In the Supreme Court of the United States

OCTOBER TERM, 1991

CITY OF BURLINGTON, PETITIONER

v.

ERNEST DAGUE, SR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

MAUREEN E. MAHONEY
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

ANNE S. ALMY
MARK R. HAAG
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

The petition for a writ of certiorari was granted only as to the following question: May a court, in determining a reasonable attorney's fee award under Section 7002(e) of the Solid Waste Disposal Act, 42 U.S.C. 6972(e), or Section 505(d) of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1365(d), enhance the fee award above the lodestar amount in order to reflect the fact that the attorneys had taken the case on a contingent-fee basis, thus assuming the risk of receiving no attorney's fees at all?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-810

CITY OF BURLINGTON, PETITIONER

v.

ERNEST DAGUE, SR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The United States is frequently a defendant subject to liability for attorney's fees in cases brought under Section 7002(e) of the Solid Waste Disposal Act, 42 U.S.C. 6972(e) and Section 505(d) of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1365(d). The United States has similar exposure to fee awards under more than 100 other statutes, including Title VII and other anti-discrimination statutes. Given the large number of such awards annually, a decision concerning the availability of contingency enhancements carries enormous fiscal consequences to the United States. On the other hand, the government is also concerned that fees available for private enforcement of federal

statutes be adequate to ensure that meritorious suits will be pursued.

STATEMENT

This litigation concerned environmental challenges to petitioner's operation of a municipal landfill on property adjacent to property owned by respondents. Respondents' complaint alleged violations of the Solid Waste Disposal Act (SWDA), the Clean Water Act, and state law, and sought a variety of relief, including costs and attorney's fees. After a bench trial, the district court found that petitioner had violated certain provisions of SWDA, the Clean Water Act, and state law, and ordered injunctive relief. Pet. App. 59-115.

With regard to the fee petition, the district court found that respondents had substantially prevailed and awarded them $247,534.37 in attorney's fees. This award included a "lodestar" amount of $198,027.50, plus a 25% contingency enhancement of $49,506.87. Pet. App. 133-134. Following applicable Second Circuit precedent, the district court reasoned that "[w]ithout the possibility of a fee enhancement . . . competent counsel might refuse to represent [environmental] clients thereby denying them effective access to the courts." Pet. App. 132 (quoting *Friends of the Earth* v. *Eastman Kodak Co.*, 834 F.2d 295, 298 (1987), and *Lewis* v. *Coughlin*, 801 F.2d 570, 576 (1986)).

The court of appeals affirmed. In its analysis of the contingency fee enhancement issue, the court concluded that none of the three separate opinions in *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (*Delaware Valley II*) was dispositive, and that "the issues of whether and when a contingency enhancement is warranted are open issues for the Supreme Court yet to decide." Pet. App. 36. On that basis, the Second Circuit reasoned that its own prior decisions remained the controlling precedent, which the district court had properly applied in determining that a 25% enhancement was appropriate. Pet. App. 37.

The City of Burlington then filed a petition for a writ of certiorari. The petition presented a number of questions, but this Court limited its grant of the writ to the question of whether the contingency fee enhancement was permissible under the statute.[1]

SUMMARY OF ARGUMENT

Under the typical fee-shifting statute, a prevailing party is entitled to a reasonable attorney's fee. This Court has adopted a presumption that the fee award should generally be based on the lodestar amount: a reasonable hourly rate times the number of hours reasonably expended on the case. Although the Court in *Delaware Valley II* considered whether the lodestar may be enhanced to reflect the risk of loss, the opinions in that case leave the issue unsettled.

We submit that no such enhancements should be permitted. Neither the statutory language nor the limited legislative history indicates that Congress intended to permit them. The lodestar amount represents, by definition, a "reasonable fee" for services rendered, and the statute makes no provision for other types of charges, to create still greater inducements for counsel to bring such actions. Indeed, since such awards serve to subsidize counsel for unsuccessful litigation, they are inconsistent with the statu-

[1] Issues concerning the merits of the litigation are accordingly not before this Court, and we express no views as to those issues.

tory directive that fee awards be made only to prevailing parties.

Judicial attempts to formulate practical standards to identify the circumstances in which a contingency enhancement would be appropriate and to provide guidance to the district courts concerning the methods for calculating such awards have not been successful, and there is no persuasive evidence that such awards are necessary to serve the purposes of fee-shifting statutes by assuring the availability of competent counsel to litigate meritorious cases. If Congress nevertheless concludes as a matter of policy that contingency enhancements are an appropriate part of a reasonable attorney's fee, it is free to so specify, and to provide standards for their assessment. In the absence of such congressional guidance, the statutory authority to award a reasonable attorney's fee should not be interpreted to include the authority to use a contingency enhancement in calculating that fee.

ARGUMENT

STATUTES REQUIRING REASONABLE ATTORNEY'S FEES TO BE PAID TO A PREVAILING PARTY DO NOT AUTHORIZE THE AWARD OF CONTINGENCY FEE ENHANCEMENTS OVER AND ABOVE THE LODESTAR

A. This Court Has Established A Presumption That The Lodestar Represents a Reasonable Fee

1. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 269 (1975), reaffirmed the "American Rule" requiring each litigating party to pay its own attorney's fees; fee-shifting is generally not permitted in the absence of an express statutory provision authorizing it. See *Hensley* v. *Eckerhart*,

461 U.S. 424, 429 (1983).[2] But Congress has often provided such authorization, to encourage citizens to vindicate important public rights (*e.g.*, S. Rep. No. 1196, 91st Cong., 2d Sess. 36 (1970) (fee-shifting under Clean Air Act)), or to ensure effective access to the judicial process for persons who might not otherwise be able to obtain legal counsel (*e.g.*, H.R. Rep. No. 1558, (94th Cong., 2d Sess. 1 (1976) (fee-shifting under Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988)). See *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560, 565 (1986) (*Delaware Valley I*); *Hensley*, 461 U.S. at 429.

Congress has accordingly authorized courts to award attorney's fees in litigation arising under a wide variety of statutes. See *Alyeska*, 421 U.S. at 260-262 & n.33.[3] The statutory language of these provisions typically authorizes the court to award "reasonable attorney's fees" to the "prevailing" or

---

[2] Absent statutory authorization, there are three limited situations in which fee-shifting is permitted notwithstanding the American Rule. Courts may use their equitable powers to award fees under the common fund, common benefit, and bad faith exceptions to the no-fee rule. *Alyeska*, 421 U.S. at 257-260; *Pennsylvania* v. *Delaware Valley Citizens Council for Clean Air*, 478 U.S. 546, 562 n.6 (1986) (*Delaware Valley I*). None of these exceptions is at issue in the present case.

[3] These statutes include, *inter alia*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k); the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988; the Clean Air Act, 42 U.S.C. 7413(b), 7604(d), 7607(f), 7622(b)(2)(B); the Consumer Product Safety Act, 15 U.S.C. 2060(c), 2060(f), 2072(a), 2073; the Truth in Lending Act, 15 U.S.C. 1640(a); the Clayton Act, 15 U.S.C. 15; the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 15c(a)(2) and (d)(2), 26; the Copyright Act, 17 U.S.C. 505; and the Trademark Act, 15 U.S.C. 1117.

"substantially prevailing" party.[4] Thus, faced with a fee request under a fee-shifting statute, a court must determine whether the party has "substantially prevail[ed]," and if so, what fee amount is "reasonable."

2. The language of the standard fee-shifting provisions provides no real guidance as to what is "reasonable" or what it means to be "substantially prevailing." The legislative histories of most fee-shifting statutes are likewise silent on these questions. Congress did, however, briefly address these issues in enacting the attorney's fee provision of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. 1988 (Section 1988).[5] There, Congress stated that "fees [should be] adequate to attract competent counsel, but [should] not produce windfalls to attorneys." S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976). See also H.R. Rep. No. 1158, 94th Cong., 2d Sess. 9 (1976) (same). The Committee Reports cite *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), as listing the factors to be considered in fixing a fee award.[6] H.R. Rep. No. 1558, *supra*, at 8; S. Rep. No. 1011, *supra*, at 6.[7]

3. In its decisions since *Alyeska* and the enactment of Section 1988, this Court has gradually refined and clarified the standards for awarding attorney's fees. See *Delaware Valley I*, 478 U.S. at 561-566 (describing the Court's evolving views on "reasonable" attorney's fees).[8] As the Court observed in

---

[4] See, *e.g.*, Clean Water Act § 505(d), 33 U.S.C. 1365(d) ("The court * * * may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate."); Solid Waste Disposal Act § 7002(e), 42 U.S.C. 6972(e) (identical provision); Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988 ("the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.").

[5] In *Hensley*, 461 U.S. at 433 n.7, the Court observed that the standards for determining "reasonable" fees under Section 1988 apply equally to other federal statutes awarding such fees.

[6] The *Johnson* factors are (488 F.2d at 717-719):

> (1) The time and labor required; (2) The novelty and difficulty of the questions; (3) The skill requisite to perform the legal service properly; (4) The preclusion of other employment by the attorney due to acceptance of the case; (5) The customary fee; (6) Whether the fee is fixed or contingent; (7) Time limitations imposed by the client or the circumstances; (8) The amount involved and the results obtained; (9) The experience, reputation, and ability of the attorneys; (10) The "undesirability" of the case; (11) The nature and length of the professional relationship with the client; and (12) Awards in similar cases.

[7] In addition, the Senate Report cites three district court decisions as examples of the correct application of the *Johnson* standards in setting a fee award. S. Rep. No. 1011, *supra*, quoted in *Hensley* v. *Eckerhart*, 461 U.S. at 430 n.4. See discussion *infra* at 24-25.

[8] With respect to the requirement that the party seeking fees "prevail[]" or "substantially prevail[]," the Court has held that while a party cannot be considered "prevailing" unless he or she receives "at least some relief on the merits of his claim," *Hewitt* v. *Helms*, 482 U.S. 755, 759-760 (1987), substantial success is not required. If a party succeeds on "'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit' the plaintiff has crossed the threshold to a fee award of some kind." *Texas State Teachers Ass'n* v. *Garland Independent School District*, 489 U.S. 782, 791-792 (1989) (quoting *Nadeau* v. *Helgemoe*,

that case (*id.* at 563), the *Johnson* factors actually provide little guidance to district courts: "[s]etting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results."

a. The Court first addressed the question of what constitutes a "reasonable" fee in *Hensley*. The Court identified the "lodestar"—a reasonable number of hours multiplied by a reasonable hourly rate—as the "most useful starting point" for determining the amount of fees. 461 U.S. at 433. While the Court indicated that the lodestar could be adjusted upward or downward on the basis of other considerations, including the "results obtained" and other *Johnson* factors, it noted that many of the *Johnson* factors are subsumed within the lodestar calculation. *Id.* at 434 & n.9.[9]

---

581 F.2d 275, 278-279 (1st Cir. 1978)). But meeting this standard gets plaintiff only across the threshold; the court must still determine what fee is reasonable under the circumstances.

[9] With respect to adjustment for the "results obtained," the Court observed (461 U.S. at 435-436) that:

> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended * * *, and indeed in some cases of exceptional success an enhanced award may be justified. * * *
>
> If, on the other hand, a plaintiff has achieved only partial or limited success, the [lodestar] may be an excessive amount. * * *

The Court acknowledged that it was providing only limited guidance in this regard: "There is no precise rule or formula for making these determinations" (461 U.S. at 436), but the court's exercise of its discretion must take account of these considerations. *Id.* at 436-437.

In *Blum* v. *Stenson*, 465 U.S. 886 (1984), the next case to address the issue, the Court placed added emphasis on the lodestar. It announced that the lodestar amount is "presumed to be the reasonable fee," *id.* at 897, and limited the use of the *Johnson* factors. As subsequently explained in *Delaware Valley I* (478 U.S. at 565), the Court in *Blum*

> specifically held * * * that the "novelty [and] complexity of the issues," "the special skill and experience of counsel," the "quality of representation," and the "results obtained" from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award.

Blum specifically left open the question of whether enhancement of the lodestar to compensate for the risk of not prevailing is ever permissible. 465 U.S. at 901 n.17.[10]

---

[10] The Court has also considered the significance of a contingent fee arrangement between the prevailing party and his lawyer in the calculation of a fee award. It concluded that a plaintiff may make any appropriate contingency fee arrangements he chooses with his attorney to govern the damages to be recovered in his suit, notwithstanding the availability of statutory fees; such arrangements will not prejudice the fee award. In *Blanchard* v. *Bergeron*, 489 U.S. 87, 93 (1989), the Court held that "a contingent-fee contract does not impose an automatic ceiling on an award of attorney's fees." As the Court further explained in *Venegas* v. *Mitchell*, 495 U.S. 82, 90 (1990):

> § 1988 controls what the losing defendant must pay [to the plaintiff], not what the prevailing plaintiff must pay his lawyer. What a plaintiff may be bound to pay and what an attorney is free to collect under a fee agreement are not necessarily measured by the "reasonable attor-

b. In *Delaware Valley II*, the Court first addressed the precise issue presented in this case—whether the typical fee-shifting statute permits the award of a contingency enhancement to compensate the plaintiff (or more precisely his lawyer) for assuming the risk of not prevailing, and of thus receiving no fee award. The Court there reversed an award of a 100% contingency enhancement, but could not reach agreement on the issues of whether and when a contingency enhancement may be allowed under fee shifting statutes. Justice White, writing for a plurality of four Justices, concluded that "enhancement of a reasonable lodestar fee to compensate for assuming the risk of loss is impermissible under the usual fee-shifting statutes" (483 U.S. at 727). But even if enhancement were ever permitted, the plurality found that the facts at issue did not justify such an award, which "should be reserved for exceptional cases where the need and justification for such enhancement are readily apparent and are supported by evidence in the record and specific findings by the courts." *Id.* at 728 (citing *Blum* v. *Stenson*, 465 U.S. at 898-901). Justice Blackmun, in a dissent joined by three other Justices, took the opposite view, asserting that "[a]n adjustment for contingency is necessary if statutory fees are to be competitive with the private market" (*id.* at 740).

Justice O'Connor, in a separate concurrence, joined in the plurality's judgment that a contingency enhancement was not justified in the case before the

---

ney's fee" that a defendant must pay pursuant to a court order.

In reaching this conclusion, the Court observed in passing that "in construing § 1988, we have generally turned away from the contingent-fee model to the lodestar model" (495 U.S. at 87).

Court (483 U.S. at 731). But she also agreed with the dissent that "Congress did not intend to foreclose consideration of contingency in setting a reasonable fee under [typical] fee-shifting provisions" (*ibid.*). Emphasizing that "compensation for contingency must be based on the difference in [the] market treatment of contingent fee cases *as a class*, rather than on an assessment of the 'riskiness' of any particular case" (*ibid.*), she observed that courts "should treat a determination of how a particular market compensates for contingency as controlling future cases involving the same market" (*id.* at 733). Nevertheless, she also agreed with the plurality's conclusion that "no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market,'" *ibid.* (quoting plurality opinion at 731).[11]

---

[11] The courts of appeals have sought to apply *Delaware Valley II* in numerous cases under the various federal fee-shifting statutes when prevailing plaintiffs have sought contingency enhancements. See, *e.g.*, *McKenzie* v. *Kennickell*, 875 F.2d 330 (D.C. Cir. 1989), overruled by *King* v. *Palmer*, 950 F.2d 771 (D.C. Cir. 1991); *Rode* v. *Dellarciprete*, 892 F.2d 1177, 1184-1185 (3d Cir. 1990); *Student Pub. Interest Research Group* v. *AT & T Bell Laboratories*, 842 F.2d 1436, 1451 (3d Cir. 1988); *Blum* v. *Witco Chem. Corp.*, 829 F.2d 367, 379-382 (3d Cir. 1987); *Craig* v. *Secretary, HHS*, 864 F.2d 324, 327-328 (4th Cir. 1989); *Spell* v. *McDaniel*, 824 F.2d 1380, 1403-1405 (4th Cir. 1987), cert. denied, 484 U.S. 1027 (1988); *Leroy* v. *City of Houston*, 831 F.2d 576, 583-584 (5th Cir. 1987), cert. denied, 486 U.S. 1008 (1988); *Skelton* v. *General Motors Corp.*, 860 F.2d 250, 254 (7th Cir. 1988); *Hendrickson* v. *Branstad*, 934 F.2d 158, 162-163 (8th Cir. 1991); *D'Emanuele* v. *Montgomery Ward & Co.*, 904 F.2d 1379, 1384 (9th Cir. 1990); *Fadhl* v. *City of San Francisco*, 859 F.2d 649, 650-651 (9th Cir. 1988); *Smith* v. *Freeman*,

B. The Statutory Language Should Not Be Interpreted To Authorize The Award of Enhancements Because The Lodestar Establishes The Reasonable Attorney's Fee Necessary To Compensate A Prevailing Party

Although this Court has previously established a presumption that the lodestar amount is fully compensatory, we submit that it is now appropriate for this Court further to hold that this presumption is conclusive, because the lodestar is the definitive measure of "reasonable" attorney's fees authorized by the statutory language.[12] No upward adjustments to the lodestar should be permitted, and downward adjustments should be made where the prevailing

---

921 F.2d 1120, 1122-1123 (10th Cir. 1990); *Wulf* v. *City of Witchita*, 883 F.2d 842, 876 (10th Cir. 1989); *Norman* v. *Housing Auth.*, 836 F.2d 1292, 1302 (11th Cir. 1988).

Most of these decisions have assumed that Justice O'Connor's concurrence states the controlling rule, and have followed her view that contingency fee enhancement may be allowed in certain limited circumstances. See, *e.g.*, *Fadhl* v. *City of San Francisco*, 859 F.2d 649, 650 n.1 (9th Cir. 1988); *McKenzie* v. *Kennickell*, 875 F.2d 330 (D.C. Cir. 1989). But in *King* v. *Palmer*, 950 F.2d 771 (1991), the D.C. Circuit, sitting en banc, reconsidered its *McKenzie* interpretation of *Delaware Valley II*. Like the Second Circuit in this case (Pet. App. 36), the D.C. Circuit in *King* concluded that the opinions in *Delaware Valley II* involve "three distinct approaches to the issue of contingency enhancements in fee-shifting statutes, none of which enjoys the support of five Justices" (950 F.2d at 782). In the absence of a controlling opinion of this Court, the D.C. Circuit determined that "the appropriate course is to hold that contingency enhancements will not be available in this Circuit." 950 F.2d at 784.

[12] The court below correctly noted (Pet. App. 34-35) that this Court's rulings have already established that all the *Johnson* factors except contingency enhancements are subsumed in the lodestar. See *Blum*, 465 U.S. at 898-900; *Delaware Valley I*, 478 U.S. at 565.

party is only partially successful. This interpretation best conforms to the statutory language, minimizes unnecessary litigation, and produces predictable, fair results and is consistent with the legislative history.[13]

1. *Contingency Enhancements Conflict With The Statutory Language By Improperly Compensating Persons Who Were Not "Prevailing Parties"*

Enhancing fees to compensate for risk of loss requires the losing party to compensate the prevailing party for both the successful claim and for other, unsuccessful claims in other lawsuits. Since the typical fee-shifting statute provides that only "prevailing parties" are entitled to fees, this result is inconsistent with the scheme established by Congress.

Courts and commentators have traditionally viewed contingency multipliers as compensating the attorney for bearing an appreciable risk of nonpayment as a result of lack of success on the merits. Under this view, because the lodestar is calculated on the basis of a reasonable hourly rate for litigation in which the attorney is paid regardless of the outcome, additional compensation is thought to be necessary in order to induce attorneys to take on a case in which there is a chance they will receive no fee. See, *e.g.*, *Delaware Valley II*, 483 U.S. at 737 (dissenting opinion) ("[T]he market-based fee or hourly rate that is contingent on success is necessarily higher than the hourly rate charged when payment is current and certain. This fee enhancement ensures that

---

[13] Although there may be disagreements as to the market rate or the reasonableness of the total number of hours claimed by the prevailing party, these are basic factual determinations that do not present any fundamental conceptual difficulties.

accepting cases on a contingent basis remains an economically attractive and feasible enterprise for lawyers."). Accord *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973); *Copeland* v. *Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980); *Jones* v. *Diamond*, 636 F.2d 1364, 1382 (5th Cir.), cert. granted, 452 U.S. 959, dismissed by agreement, 453 U.S. 950 (1981); Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U.Pa. L. Rev. 281, 324-326 (1977).

In effect, contingency awards compensate attorneys for their unsuccessful efforts. As the court stated in *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 685 (N.D. Cal. 1974), aff'd, 550 F.2d 464 (9th Cir. 1977), rev'd on other grounds, 436 U.S. 547 (1978):

> From the attorneys' standpoint, the contingent fee insures that counsel are compensated not only for their successful efforts but also for unsuccessful litigation. Its use allows attorneys—including attorneys who could not otherwise absorb the costs of lost cases—to take the financial gamble of representing penurious clients, since over the long run, substantial fees awards in successful cases will provide full and fair compensation for all legal services rendered to all clients.

That is precisely why contingency awards are inconsistent with statutory provisions allowing fees only to prevailing parties. See, *e.g.*, *Murray* v. *Weinberger*, 741 F.2d 1423, 1431 (D.C. Cir. 1984); ("Awarding an upward adjustment to the lodestar for the risk of losing and the concomitant risk of not obtaining an award of attorney's fees is not unlike compensating an attorney for unsuccessful claims; it

hedges the statute's requirement that only prevailing parties may recover attorney's fees."); cf. *Delaware Valley II*, 483 U.S. at 724-725 (plurality opinion); *McKinnon* v. *City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984); *Laffey* v. *Northwest Airlines, Inc.*, 746 F.2d 4, 27 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985).[14]

The rationale for contingency multipliers as expressed in *Stanford Daily* is inconsistent with the Court's decision in *Hensley* v. *Eckerhart*, *supra*. See *Laffey*, 746 F.2d at 27; *Murray*, 741 F.2d at 1431. The award of a contingency multiplier in effect compensates a prevailing party's counsel for the risk that he might have lost the case and, thus, subsidizes counsel for unsuccessful litigation.[15] But the Court held

---

[14] There is direct evidence that Congress did not intend fee-shifting statutes to operate in this fashion. During the House hearings on the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, Representative Sieberling stated:

> [S]ome people may conclude that the [fee provision is] intended to promote the special interests of lawyers. Perhaps that is so to the extent it promotes the interests of successful lawyers who make the right judgment or who handle the case properly so that they win.
>
> But it certainly is not calculated to promote the interests of lawyers who make the wrong judgment * * *.

Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 8 (1975). See also *Ruckelshaus* v. *Sierra Club*, 463 U.S. 681, 692-693 & n.13 (1983) ("central purpose" of § 304(d) of Clean Air Act (42 U.S.C. 7604(d)) was to "check the 'multiplicity of [potentially meritless] suits'").

[15] For example, if the chance of success in a particular case in which a party actually prevails were adjudged (with hindsight) to have been 50 percent at the time the complaint was

in *Hensley* (461 U.S. at 434-436) that Congress did not intend to saddle a losing defendant with attorney's fees incurred by a partially successful plaintiff in the pursuit of discrete claims on which the plaintiff did not prevail. *A fortiori*, it did not intend to require a defendant to pay the attorney's fees of a totally unrelated plaintiff whom the defendant has not harmed in any way. Accord *Ruckelshaus* v. *Sierra Club*, 463 U.S. at 691-692 (prohibition of fee awards to nonprevailing parties).

In sum, enhancing fees to compensate for risk of loss "is not consistent with Congress' decision to adopt the rule that only prevailing parties are entitled to fees." *Delaware Valley II*, 483 U.S. at 725 (plurality opinion).

2. *Contingency Enhancements Are Not Necessary To Ensure That Parties Will Be Able To Obtain Representation*

The purpose of fee-shifting statutes is to encourage and enable private parties to obtain counsel. See, *e.g.*, *Delaware Valley II*, 483 U.S. at 725 (plurality opinion). Awards limited to the lodestar amount fully satisfy that purpose, however. Potential for reimbursement will cause many persons who would not otherwise be willing to file suit to advance fees to their lawyers in anticipation of a fee award at the conclusion of the litigation.

---

filed, a risk multiplier of two might be employed. Assuming the risk assessment were accurate, it could be expected that counsel would succeed in one out of every two similar cases filed. The effect of doubling counsel's fee recovery for prevailing in the first case is indistinguishable from paying for the time counsel devotes to its hypothetical unsuccessful twin.

Even plaintiffs financially unable to make such advances will nevertheless still be able to retain counsel under the lodestar interpretation. Contingent fee representation would still be available in cases where the potential for damages provides a source of fees, since the normal market for contingency operates. See, *e.g.*, *Blanchard*, 489 U.S. at 87; *Venegas* v. *Mitchell*, 495 U.S. at 82. Similarly, contingency enhancements would also be unnecessary where the defendant's liability is clear, because in those cases some fee award is virtually certain and counsel would have adequate incentive to take the case in expectation of future payment. See *Texas State Teachers Ass'n* v. *Garland Independent School District*, 489 U.S. at 791-792.[16] Thus, the only cases where contingency enhancements might be necessary to attract competent counsel to represent plaintiffs who are unable to pay fees are cases where liability is uncertain and damages are not a possibility.

Even in this limited class of cases, we submit that a contingency enhancement over the lodestar is not necessary to enable a plaintiff with a case involving a fair chance of success to obtain competent counsel.[17]

---

[16] This is often the case under federal environmental statutes. Under the Clean Water Act, for instance, sources are subject to strict numerical limitations on their discharges, and are required to monitor and report their discharge levels. See Clean Water Act §§ 301, 308, 402, 33 U.S.C. 1311, 1318, 1342. In a suit to enforce these provisions, the discharge monitoring reports provide virtually irrefutable evidence of liability. *Sierra Club* v. *Union Oil Co.*, 813 F.2d 1480, 1491-1492 (9th Cir. 1987), remanded on other grounds, 485 U.S. 931 (1988); *Public Interest Research Group* v. *Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 68 (3d Cir. 1990), cert. denied, 111 S. Ct. 1018 (1991).

As the plurality opinion in *Delaware Valley II* observed (483 U.S. at 726-727):

> [fee enhancement for risk is unnecessary] in those cases where plaintiffs secure help from organizations whose very purpose is to provide legal help through salaried counsel to those who themselves cannot afford to pay a lawyer. It is also unlikely to be [necessary] in any market where there are competent lawyers whose time is not fully occupied by other matters.
>
> * * * * *
>
> It may be that without the promise of risk enhancement some lawyers will decline to take cases; but we doubt that the bar in general will so often be unable to respond that the goal of the fee-shifting statutes will not be achieved.

This analysis is confirmed by the fact that such cases continue to be brought, although it does not appear that contingency enhancements have been so generally awarded that counsel in any particular case can reasonably base the decision to accept the case on the expectation of such an award. See H. Newberg, *Attorney Fee Awards* § 31.01 (1986 & Supp. 1991) (listing cases in which multipliers allowed after *Blum*).

3. *The Test Of The* Delaware Valley II *Concurrence Has Proven To Be Unworkable*

Justice O'Connor's concurrence, which has been generally accepted as the holding of *Delaware Valley II* (note 11, *supra*), requires a two-step analysis:

---

[17] We do not believe that it is consistent with the purposes of these statutes to encourage the bringing of truly marginal cases. See note 18, *infra*.

the court must consider first, how the relevant market compensates for contingency, and second, whether the fee applicant would have faced "substantial difficulties" in attracting counsel to handle the case without the prospect of enhancement. *Delaware Valley II*, 483 U.S. at 733. Experience now demonstrates that there are serious practical difficulties with both steps.

a. The "market based" inquiry is designed to avoid the serious theoretical and practical objections to basing a contingency enhancement on an assessment of the risk of prevailing in the particular case in which the fee is sought.[18] But this approach itself creates another difficulty: the identification of the relevant market. As the concurrence recognized, "[i]n most fee-shifting cases * * * the private market model of contingency compensation will provide very

---

[18] That approach was eschewed by all nine Justices in *Delaware Valley II* (483 U.S. at 719-723 (plurality opinion), 731 (concurring), 745-746 (dissenting). The plurality opinion summarized the objections to it. Under an "individual riskiness" regime, the riskier the case, the greater the "need" for enhancement. This penalizes the losing parties with the strongest and most reasonable defenses, "creating a perverse penalty for those least culpable." 483 U.S. at 719. In addition, "[e]valuation of the risk of loss creates a potential conflict of interest between an attorney and his client, for in order to increase a fee award, a plaintiff's lawyer must expose all of the weaknesses and inconsistencies in his client's case" (*id.* at 721-722); it is inherently difficult and unreliable to require a court to estimate retroactively the prevailing party's chances of success in order to calculate the proper amount of enhancement (*id.* at 722); "because the contingency bonus cannot be determined with either certainty or accuracy, it 'cannot be justified on the ground that it provides an appropriate incentive for litigation'" (*ibid.*); and individualized contingency fee enhancement further complicates the already protracted and complex task of setting fees under the fee-shifting statutes (*id.* at 483-484).

little guidance." 483 U.S. at 731 (citing *City of Riverside* v. *Rivera*, 477 U.S. 561, 573-576 (1986)).[19] Considering the relevant market to be comprised of cases concerning similar subject matter—for example discrimination cases for Title VII awards, and environmental cases for SWDA and Clean Water Act awards—does not resolve the difficulty. In these areas, and for many, if not most, fee-shifting statutes, there does not appear to be a significant comparable private market (*i.e.*, one in which a prevailing party may not recover under a fee shifting provision).

Where a fee shifting statute assures that the prevailing party's fee will be paid by his opponent, there is no market incentive to control the size of the fee; instead, judicial awards determine the amount of any fee award. Thus, if fee enhancements are routinely awarded, attorneys can be expected to seek (and their

[19] Contingency fees are typically used in private tort law, where the fee is paid out of the successful plaintiff's damage award. In that context, it is at least roughly equitable to tie the attorney's fee to the size of the damage award obtained through his efforts. But many statutes with fee-shifting provisions—including the SWDA and the Clean Water Act—do not allow plaintiffs to recover monetary damage awards from defendants. Under the Clean Water Act and SWDA, only three forms of relief are available to private plaintiffs—injunctions, civil penalties payable to the United States Treasury, and litigation costs. 33 U.S.C. 1365(a) and (d) (Clean Water Act); 42 U.S.C. 6972(a) and (e) (SWDA). See *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981). Similarly, as *Riverside* demonstrates, many Title VII cases produce little or no monetary recovery, and therefore do not provide a basis for percentage-based contingency fees. The rationale applicable to the situation in which the fee is paid out of the recovery obtained by the plaintiff is simply inapplicable where there is no such fund, and the award is paid directly by the defendant.

clients will have no reason to oppose) fee agreements that include contingency enhancements, and ultimately to decline to accept cases under fee-shifting statutes on any lesser basis. Judicial determinations of how the "market" compensates for contingency would then have become a self-fulfilling prophecy, rather than any true indication that enhancement is in fact necessary to attract competent counsel.

b. As the court in *King* v. *Palmer* recognized (950 F.2d at 779-780), the "substantial difficulties" aspect of the concurrence's test is also problematic. The court first concluded that both the *Delaware Valley II* concurrence and the plurality "envisioned a particularized factual inquiry into the plaintiff's *actual* difficulties in retaining counsel." *Id.* at 778.[20] It then identified three critical problems with the substantial difficulties test. First, "focusing on actual difficulties will encourage 'a charade in which clients seeking representation under fee shifting statutes would be steered to several attorneys whose prearranged role it would be to "refuse" the case, knowing that such refusals were necessary to permit the eventual award of fees.'" *Id.* at 780. Second, em-

[20] The *King* court correctly concluded (950 F.2d at 779 that self-serving, *post hoc* affidavits by counsel, who had never been approached by plaintiff, that they would not take cases like hers without a contingency enhancement were insufficient to meet the "substantial difficulties" test. Cf. *Department of Labor* v. *Triplett*, 494 U.S. 715, 723-724 (1990) (rejecting "anecdotal evidence" in the form of attorney affidavits asserting the inadequacy of available attorney fees). But see *Norman* v. *Housing Authority*, 836 F.2d 1292 (11th Cir. 1988) (proper to rely on such affidavits); cf. *Blum* v. *Witco Chemical Corp.*, 829 F.2d 367, 381 (3d Cir. 1987) (suggesting appointment of special master to consider comments of bar and litigants, and make findings regarding need for contingency enhancements).

phasizing the actual difficulties will "create perverse incentives" by discouraging reference services that make it easier for litigants to find legal representation. *Ibid.*

Third, the court recognized the close relation between the difficulty in obtaining counsel and the merits of the claim to be asserted. 950 F.2d at 780. Risk of loss is surely the principal reason a lawyer will turn down a case under a fee-shifting statute. Yet under both the plurality and concurring opinions in *Delaware Valley II*, the risk of loss in a particular case is not a factor that courts may look at in determining whether a contingency enhancement is appropriate. 483 U.S. at 724 (concurring opinion); *id.* at 726-727 (plurality opinion); see also *id.* at 745-746 (dissenting opinion, noting that contingency enhancement not designed primarily to reflect risk of loss in particular case). In other words, the "substantial difficulties" test largely measures the "riskiness" of the case—precisely the factor that both the plurality and the concurrence in *Delaware Valley II* agree may *not* be considered.[21] Faced with these problems, the *King* court correctly concluded that the "substantial difficulties" test is unworkable (950 F.2d at 780):

> The more we struggle with this problem, the more we are convinced that it is virtually impossible to determine whether a given plaintiff would have had "substantial difficulties" in obtaining counsel without a contingency enhancement. The inquiry is quite artificial because, by

[21] As the *King* court observed (950 F.2d at 780): "[i]f the courts cannot [consider legal risk] directly, how can it be appropriate to do so vicariously through the eyes of the lawyers who declined the case?"

> definition, the plaintiff stands before the court with counsel. And since counsel could not possibly know whether a risk enhancement was in the offing until a court decides the question years later, our inquiry is circular.

4. *The Legislative History Of Section 1988 Does Not Support The Lower Court's Conclusion That Contingency Fee Enhancements Were Authorized By Congress*

Despite the absence of any statutory language indicating that contingency fee enhancements may be added to lodestar fees that are otherwise reasonable, it has been suggested (*Delaware Valley II*, 483 U.S. at 738-739 (dissenting opinion)) that the legislative history of Section 1988 nevertheless requires this interpretation. A fair reading of *Johnson* and the three cases cited in the Senate Report on Section 1988, however, does not support the conclusion that Congress intended contingency multipliers to be an element of "reasonable" attorney's fees.

Although the *Johnson* factors include consideration of "[w]hether the fee is fixed or contingent" (488 F.2d at 718), "a careful reading of *Johnson* shows that the contingency factor was meant to focus judicial scrutiny solely on the existence of any contract for attorney's fees which may have been executed between the party and his attorney." *Delaware Valley II*, 483 U.S. at 723 (plurality opinion). Accord Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473, 479 n.38 (1981). Apparently, therefore, the Fifth Circuit meant only that the nature of the parties' fee arrangements should be taken into account in determining the reasonableness of a particular fee award; "there is nothing in *Johnson* to show that this factor was meant to reflect the contingent nature of prevailing in the lawsuit as

a whole." *Delaware Valley II*, 483 U.S. at 723 (plurality opinion).[22]

The cases cited with approval in S. Rep. No. 1011, *supra*, confirm this analysis. No bonus of any kind was awarded in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975). There, the court simply reviewed nine factors, similar to those listed in *Johnson*, and *reduced* the prevailing party's fee request by roughly 15%. In *Davis* v. *County of Los Angeles*, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974), the district court added a "Result Charge" to the basic award for "Attorneys' Time" at the "normal hourly rates." As the label used suggests, the fee was enhanced not as compensation for the risk of nonpayment due to failure on the merits, but because the court believed that counsel had "achieved excellent results" and that "[t]he nature of the case made it difficult to litigate" (8 Empl. Prac. Dec. (CCH) ¶ 9444, at 5048). In *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 688 (N.D. Cal. 1974), the district court did consider the contingency factor. It ruled that "the contingent nature of compensation, the quality of the attorneys' work, and the results obtained by the litigation warrant[ed] increasing the base fees figure (hours worked times average billing rate)."[23] The *Stanford Daily* court's

[22] Moreover, this Court has rejected the position that each separately listed *Johnson* factor identifies an appropriate enhancement to the lodestar. *Blum* v. *Stenson*, 465 U.S. at 898-899; *Delaware Valley I*, 478 U.S. at 564, 566. Accord *King* v. *Palmer*, 950 F.2d at 784 n.8.

[23] Although the district court did not explain how it had translated these factors into a specific dollar amount, it emphasized that the various *Johnson* factors overlap and that "recognition of their overlap [is needed to avoid] unnecessary inflation of the attorneys' fees award" (64 F.R.D. at 682).

approach was thus consistent with the one used in *Johnson*; it evaluated whether the base fee adequately reflected not only the contingent nature of the compensation, but also the quality of the work product and the results obtained. In *Blum*, the Court recognized that the latter two factors—like those relied on in *Davis*—are subsumed within a properly calculated lodestar fee. 465 U.S. at 898-900. The citation to *Stanford Daily* in the Senate Report does not require that the "contingency" factor is to be treated any differently.

As the plurality of this Court concluded in *Delaware Valley II*, 483 U.S. at 724, "[g]iven the divergence in both analysis and result between these three cases, the legislative history is, at best, inconclusive in determining whether Congress endorsed the concept of increasing the lodestar amount to reflect the risk of not prevailing on the merits." There is accordingly no basis to depart from the interpretation most consistent with the language of the statute.

CONCLUSION

In light of the serious practical and theoretical difficulties inherent in determining whether a contingency enhancement of the lodestar fee may be appropriate in a particular case or in a class of cases, we submit that the statutory directive to award a "reasonable" fee to a prevailing party should not be interpreted as a congressional authorization to include such enhancements. The determination of when, if at all, such an enhancement is appropriate involves questions of policy for Congress, which is better equipped than the judiciary to develop systematic, equitable rules to govern the award of such enhancements without providing windfalls. *King* v. *Palmer*, 906 F.2d 762, 770 (1990) (Williams, J., dissenting),

rev'd, 950 F.2d 771 (D.C. Cir. 1991) (en banc). Accordingly, in the absence of definitive direction from Congress, upward adjustments to the lodestar to compensate for the contingency of loss should not be allowed.[24] The judgment of the court of appeals should accordingly be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

MAUREEN E. MAHONEY
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

ANNE S. ALMY
MARK R. HAAG
Attorneys

MARCH 1992

---

[24] The absence of express congressional authorization for contingency enhancements is particularly important where the fee-paying defendant is a governmental entity. Fee shifting statutes represent a limited waiver of sovereign immunity. *Ruckelshaus* v. *Sierra Club*, 463 U.S. at 685-686. Waivers of immunity must be strictly construed and may not be "enlarge[d] * * * beyond what the language requires." *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927); *Library of Congress* v. *Shaw*, 478 U.S. 310, 314 (1986). Accordingly, in determining whether a "reasonable" attorney's fee award may properly include a contingency enhancement, the court should be guided by the statutory language and by what Congress "clearly and unequivocally" intended. See *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45359